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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1356

JIMMY H. ROSE, Warden, Tennessee State Penitentiary,

Petitioner,

vs.

ROY LEE MORELOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT E. KENDRICK
Deputy Attorney General
State of Tennessee
215 Supreme Court Building
Nashville, Tennessee 37219

WILLIAM C. KOCH, JR.
Assistant Attorney General
State of Tennessee
419 Supreme Court Building
Nashville, Tennessee 37219

OF COUNSEL:

DAVID M. PACK
Attorney General
State of Tennessee

R. JACKSON ROSE
Assistant Attorney General
State of Tennessee

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

JIMMY H. ROSE, Warden, Tennessee State Penitentiary,

Petitioner,

vs.

ROY LEE MORELOCK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Jimmy H. Rose, Warden of the Tennessee State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 14, 1973, affirming an order of the United States District Court for the Eastern District of Tennessee entered on May 11, 1973.

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals dated July 27, 1971, affirming the dismissal of respondent's state petition for post conviction relief is reproduced as Appendix A. The Order of the United States District Court dated February 22, 1972, denying the respondent's motion to revive the proceedings is reproduced as Appendix B. The Order of the United States Court of Appeals for the Sixth Circuit dated February 9, 1973, vacating the judgment of the District Court is reproduced as Appendix C. The District Court's Memorandum and Order dated May 11, 1973, granting the petition for writ of habeas corpus is reproduced as Appendix D. The United States Court of Appeals' Order dated December 14, 1973, affirming the judgment of the District Court is reproduced as Appendix E. All these opinions, Memoranda and Orders are unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 14, 1973. This petition for certiorari is timely filed within ninety (90) days of that date pursuant to 28 U.S.C. §2101(c). Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the rule announced in *Burgett v. Texas*, 389 U.S. 109 (1967), prohibits the invocation of Tennessee's recidivist statutes when the State, as a basis for enhancing a defendant's punishment, uses a conviction wherein the defendant limited the scope of his appeal by failing to preserve a record of the proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

The power of a United States District Court to grant a writ of habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

> "§2241. Power to grant writ.
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

STATEMENT OF THE CASE

Roy Lee Morelock, the respondent, was found guilty of breaking into a public school building in Sullivan County, Tennessee on March 26, 1965. He was represented by competent, retained counsel at the trial. Thereupon, he filed a Motion for New Trial containing twenty-three assignments of error which was overruled by the trial court

on May 6, 1965. At that point, the judgment for conviction became final thus giving Morelock the right to appeal. The trial court, by order dated May 6, 1965, gave Morelock sixty days within which to prepare and file a bill of exceptions. This period expired on July 6, 1965.

On July 1, 1965, fifty-five days after the Motion for New Trial had been overruled, Morelock and his heretofore retained counsel first informed the trial court that Morelock was indigent. This action was taken for the sole purpose of obtaining a free verbatim transcript of the proceedings below pursuant to a state statute[1] that went into effect on July 1, 1965.

The trial court, upon hearing these allegations, ruled that it had no authority to grant the relief Morelock requested because, by law, it lost jurisdiction over the case thirty days after the entry of its denial of the Motion for New Trial. Following the expiration of thirty days, the trial judge could only perform the ministerial act of approving the bill of exceptions tendered for his signature.

Neither Morelock nor his trial counsel attempted to prepare a narrative bill of exceptions within the remaining period of time even though this was a frequently used method of preserving an appellate record in cases involving non-capital felonies whether the appealing party was indigent or not. When no bill of exceptions of any kind

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[1] T.C.A. §40-2037. Certified transcripts-Requested by court for indigents-Requested and paid for by party-Appeal procedure unaffected.— "Upon the direction of the court in the case of an indigent defendant, or at the request of any party who has agreed to pay the fee therefor, a reporter designated by the court shall transcribe from the original records such parts of the proceedings as are requested. In any case the transcript certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and the proceedings had; provided, however, that nothing contained herein is intended to alter or amend the procedure for perfecting appeals as provided in chapter 1 of title 27 of this Code." [Acts 1965, ch. 221, §9].

was tendered, the appeal was perfected on the technical record[2] alone. On February 7, 1966, Morelock's conviction was affirmed by the Tennessee Supreme Court without an opinion.

On September 26, 1968, the respondent was convicted on both counts of a two-count indictment charging him with burglary and being an habitual criminal. Evidence of the earlier 1965 burglary conviction, as well as other convictions, was introduced by the State in order to prove the habitual criminal count. The respondent was sentenced to life imprisonment in accordance with the jury's finding that he was an habitual criminal.

Morelock never attempted to collaterally attack his 1965 burglary conviction in a state habeas corpus proceeding or pursuant to Tennessee's Post Conviction Procedure Act. Further, he never questioned the constitutionality of this conviction in the state trial court in 1968 when it was used to enhance his punishment pursuant to Tennessee's Habitual Criminal Statutes. He did not attack the validity of his 1965 conviction on his direct appeal from the 1968 enhancement of punishment even though he attacked several of the other supporting convictions.[3] This question was finally raised for the first time in 1971 in Morelock's collateral attack on his 1968 habitual criminal conviction, six years after his first burglary trial had taken place.

---

[2]The technical record consists of "all process, pleadings, and entries on the minutes, including the entry of the verdict and judgment." Caruthers' History of a Lawsuit § 431 (8th Ed. 1963). Caruthers is an authoritative treatise on Tennessee procedure. The evidence in the case forms no part of the technical record. **Broestler v. State**, 186 Tenn. 523, 212 S.W.2d 366 (1948).

[3]The Court of Criminal Appeals opinion on the respondent's direct appeal from his 1968 habitual criminal conviction is reported in **Morelock v. State**, 2 Tenn. Crim. App. 423, 454 S.W.2d 189 (1970).

On July 27, 1971, the Tennessee Court of Criminal Appeals found this argument to be without merit. Appendix A. The appellate court found that the trial court had not received timely notice of Morelock's indigency and that Morelock had no right to a verbatim transcript because his conviction had become final prior to the effective date of T.C.A. §40-2037. The appellate court also found that Morelock had waived his right to question the 1965 conviction because he did not attack it on direct appeal from his habitual criminal conviction. One judge, concurring, pointed out that Morelock never explained why a narrative bill of exceptions was not filed and that he never alleged that such a bill of exceptions would have been inadequate.

Morelock first filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee on August 27, 1971, questioning the validity of his 1965 conviction. On October 8, 1971, the district court granted the State's motion to dismiss for failure to exhaust state remedies. On February 22, 1972, the district court denied Morelock's motion to revive his petition citing the opinion of the Tennessee Court of Criminal Appeals. Appendix B. Morelock duly perfected an appeal to the United States Court of Appeals for the Sixth Circuit. On February 9, 1973, that Court, noting that the record was inadequate, vacated the district court's decision and remanded the case to the district court to make findings on four questions: (a) the grounds asserted in Morelock's Motion for New Trial following his 1965 conviction, (b) Morelock's indigency in 1965, (c) the adequacy of Morelock's legal representation in 1965, and (d) Morelock's right to a free verbatim transcript for the appeal from the 1965 conviction. Appendix C.

The district court held an evidentiary hearing and on May 11, 1973, found that there were twenty-three assign-

ments in Morelock's Motion for New Trial, that Morelock was indigent during the 1965 trial but that this was never communicated to either the court or the state, that Morelock had effective assistance of counsel, and that he was entitled to a free transcript. Appendix D. On December 14, 1973, the United States Court of Appeals for the Sixth Circuit affirmed the district court's second Memorandum and Order without opinion. Appendix E.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has sanctioned an Order of the United States District Court for the Eastern District of Tennessee wherein that court decided an important state question in direct conflict with applicable state law and in a manner not in accord with the decisions of this Court.

I.

THE RULE OF *BURGETT V. TEXAS* PROHIBITS THE INTRODUCTION OF ONLY THOSE PRIOR CONVICTIONS KNOWN TO BE CONSTITUTIONALLY INFIRM AT THE TIME OF THEIR USE.

This Court's decision in *Burgett v. Texas*, 389 U.S. 109 (1967), simply established the rule that it is a violation of the Due Process Clause to introduce against a defendant evidence of a prior conviction known to be constitutionally infirm under existing law at the time of its use. See *Loper v. Beto*, 405 U.S. 473, 493 (Burger, C.J., dissenting). The rule is, in part, based on *Gideon v. Wainwright's* retroactive application. *Burgett v. Texas*, *supra*, 389 U.S. at 114-115. In that case, the State, over the defendant's objection, introduced evidence of a prior con-

viction that had clearly been obtained in violation of the defendant's right to counsel.

The facts in this case present an entirely different situation, a situation to which the *Burgett* rule is not properly applicable. Here, the State introduced evidence of a prior 1965 conviction in a 1968 prosecution. At the time of its use in the 1968 proceeding, the validity of the 1965 conviction was never questioned. In fact, even though the defendant attacked every other offense used for enhancement purposes both at trial and on direct appeal, he did not question the validity of the 1965 burglary conviction until he collaterally attacked his habitual criminal conviction in state court.

Thus as far as the State knew during the 1968 trial, there was no legal objection to the introduction of evidence of Morelock's 1965 burglary conviction. Had timely objection been made, it would have been, and still is, baseless under existing law because Morelock's appeal from his 1965 conviction was constitutionally adequate and any inadequacy was due to his own deliberate inaction.

Apart from its application to prevent the subsequent use of non-counseled convictions, the *Burgett* rule has been applied to prohibit the use of prior convictions obtained in violation of the Sixth Amendment, *State ex rel. Stubbs v. Mancusi*, 422 F.2d 561 (2d Cir. 1971), *rev'd.* 408 U.S. 204 (1972), and in violation of the Fourth Amendment, *Beto v. Stacks*, 408 F.2d 313 (5th Cir. 1969). Both of these cases involved a specifically enumerated constitutional right, and there was no evidence of waiver on the part of the accused.

In *State ex rel. Stubbs v. Mancusi*, *supra*, the United States Court of Appeals for the Second Circuit determined the critical issue to be whether Stubbs' 1964 conviction,

allegedly obtained in derogation of his Sixth Amendment rights, was an improper predicate for an increased punishment. The Court of Appeals then proceeded to find that Stubbs' right to confront his accusers was violated because of the introduction of a transcript of an unavailable state witness' testimony and held that this finding was all that was needed to overturn Stubbs' subsequent conviction in New York.

The State of New York successfully petitioned this Court for review. This Court reversed the decision of the Court of Appeals finding that there was:

> "No constitutional error in permitting his [the State witness'] prior testimony to be read to the jury at the trial, and no constitutional infirmity in the judgment of conviction resulting from that trial that would prevent the New York courts from considering that conviction in sentencing Stubbs as a second offender."
>
> *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972).

The facts of that case show conclusively that the New York prosecutor had no reason to suspect the invalidity of the 1964 Tennessee conviction when he used it in 1966 to convict Stubbs as a second offender.

In a similar fashion, the United States Court of Appeals for the Fifth Circuit has limited its decision in *Beto v. Stacks*, *supra*. That court, reversing the decision of the district court, held that a state defendant's conviction pursuant to state recidivist statutes was not constitutionally impermissible because of a subsequent determination that one of the supporting conspiracy convictions was partially invalid. The Court, citing *Spencer v. Texas*, 385 U.S. 554 (1967), also recognized the State's interest in intro-

ducing evidence of the defendant's prior convictions for the purpose of enhancing punishment. *McCutcheon v. Estelle*, 483 F.2d 256, 262 (5th Cir. 1973). There is no reason to believe that the Texas prosecutor knew that defendant's prior conspiracy conviction was infirm when he used it.

There is, likewise, no evidence that the Tennessee prosecutor knew or had any reason to believe that Morelock's 1965 burglary conviction was constitutionally suspect when he used it against Morelock in 1968. Because of this, and because the state trial court had no opportunity to pass on this question because no objection was made at the time of its introduction, the rule of *Burgett v. Texas* should not apply to this case.

II.

NO DEFENDANT HAS AN ABSOLUTE CONSTITUTIONAL RIGHT TO A VERBATIM TRANSCRIPT FOR THE PURPOSES OF PERFECTING AN APPEAL.

The right to appeal is not a constitutionally secured right *per se*; it is raised to that level when a state provides the means to appeal in a discriminatory manner. *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956). This Court has never held that a verbatim transcript of the trial is necessary in all state appeals. In *Griffin*, this Court stated (at p. 20):

> "The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in cases. (citations omitted)"

This Court again reaffirmed this principle in *Draper v. Washington*, 372 U.S. 487, 495 (1963), and has repeatedly continued to do so. *Mayer v. City of Chicago*, 404 U.S. 189, 194-195 (1971); *Britt v. North Carolina*, 404 U.S. 226, 228 (1971); and *Gardener v. California*, 393 U.S. 367, 370-371 (1969). See also *Beadle v. State*, 203 Tenn. 97, 310 S.W.2d 157, 160 (1958). Most recently, this Court has noted:

> "And, the Court in each case emphasized that no constitutional violation would have been shown if the State had provided some 'adequate substitute' for a full stenographic transcript."
>
> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 21 (1973).

Thus unless a defendant can demonstrate that the State's substitute for a verbatim transcript was inadequate, this Court should find that the scope of his appeal complied with the requirements of the Due Process Clause.

III.

A TENNESSEE DEFENDANT IN A NON-CAPITAL CASE DID NOT HAVE A STATUTORY RIGHT TO A VERBATIM TRANSCRIPT UNTIL AFTER JULY 1, 1965.

The State of Tennessee had long afforded verbatim transcripts to indigent defendants in capital cases. This right was conferred by statute. In 1965 the Tennessee legislature conferred the right to a free transcript on all indigent defendants in felony prosecutions. The effective date of this law was July 1, 1965. On at least two occasions prior to Morelock's 1968 trial, the Tennessee Supreme Court had held that those defendants who were not

tried for a capital offense and whose prosecutions were commenced prior to the effective date of T.C.A. §40-2037 were not entitled to a verbatim transcript. *State ex rel. Phillips v. Henderson*, 220 Tenn. 701, 423 S.W.2d 489 (1968), and *State ex rel. Carson v. State*, 219 Tenn. 80, 407 S.W.2d 165 (1965). See also F. G. Hamley, The Impact of Griffin v. Illinois on State Court-Federal Court Relationships, 24 F.R.D. 75, 77 (1958). Under the rationale of these cases, Morelock would not have been entitled to the benefits of T.C.A. §40-2037 because his prosecution commenced at least four months prior to the effective date of the Act.

The decision of the United States District Court has the effect of forcing Tennessee to apply T.C.A. §40-2037 prior to the statute's effective date in direct violation of the desires of Tennessee's legislature and rulings of its courts. This is clearly improper since the right involved is not one explicitly conferred by the United States Constitution, but rather one conferred by the Tennessee legislature.

IV.

AT NO TIME HAS THE DEFENDANT DEMONSTRATED THAT THE SUBSTITUTE FOR A VERBATIM TRANSCRIPT AVAILABLE TO HIM IN 1965 WAS CONSTITUTIONALLY INADEQUATE.

The substitute for a verbatim transcript available to Morelock in 1965 was a narrative bill of exceptions. One judge of the Court of Criminal Appeals has pointed out that this was a preferable means of preserving a record on appeal at that time.[4] While there are twenty-three

[4]Appendix A p. 8a. The bill of exceptions is designed to give the exact history of the case including all material evidence. Renner v.

(Continued on following page)

assignments in Morelock's Motion for New Trial, a number of them present questions of law for which no transcript was needed. Further, the opinion of the Tennessee Court of Criminal Appeals points out that Morelock's trial counsel executed an affidavit in 1971 which stated that the only evidentiary question in the 1965 appeal was the ownership of the burglarized building. Appendix A p. 7a. This evidence could have been easily preserved with a narrative bill of exceptions.

In light of these facts, Morelock has never been able to explain why a narrative bill of exceptions was not prepared and filed within the period of time originally allowed by the trial court. A narrative bill of exceptions would have adequately preserved the evidence concerning the building's ownership, so a verbatim transcript would not have been necessary.

V.

THE RESPONDENT WAIVED HIS RIGHT TO ATTACK THE CONSTITUTIONALITY OF THE SCOPE OF HIS APPEAL BY DELAYING UNTIL THE TRIAL COURT HAD NO JURISDICTION OVER HIS CASE BEFORE CLAIMING THAT HE

(Continued from preceding page)

State, 187 Tenn. 647, 216 S.W.2d 345 (1948) and Caruthers' History of a Lawsuit §436 (8th Ed. 1963). Three weeks prior to the commencement of Morelock's trial, the Tennessee Supreme Court, finding an argument based on the Equal Protection Clause and **Griffin v. Illinois** to be without merit, upheld the use of a narrative bill of exceptions. **Sambolin v. State**, 215 Tenn. 569, 387 S.W.2d 817, 820 (1965). In **Sambolin**, the court relied on an earlier Tennessee decision which had approved the use of narrative bills of exceptions based on this Court's decision in **Miller v. United States**, 371 U.S. 192 (1943). **Beadle v. State**, 203 Tenn. 97, 310 S.W.2d 157, 160 (1958). Finally, the Tennessee Supreme Court, noting that narrative bills of exceptions were used by both indigent and non-indigent litigants, estimated that approximately 20% of all criminal appeals were heard on a narrative bill of exceptions. **Tucker v. State**, 210 Tenn. 646, 361 S.W.2d 494, 496 (1962).

WAS INDIGENT IN ORDER TO OBTAIN A FREE TRANSCRIPT.

The United States District Court found as fact that neither the State nor the trial court knew of Morelock's alleged indigency until approximately fifty-five days after his Motion for New Trial had been overruled. There is also no evidence that they had reason to know of Morelock's financial situation. During this period of time, and even during the trial itself, it is reasonable to assume that Morelock and his attorney knew of the existence of T.C.A. §40-2037. They must also have known of the statute's effective date because Morelock's declaration of indigency came on the first day the statute went into effect.

The law in Tennessee is well settled that a trial judge loses jurisdiction over a case thirty days after the entry of a final judgment (i.e., denial of Motion for New Trial). Even when a trial court allows a defendant sixty days to prepare a bill of exceptions, as was done in this case, any further orders issued by the court must be issued within the first thirty day period immediately following the order overruling the Motion for New Trial. *Hethcoat v. State*, 213 Tenn. 563, 376 S.W.2d 478 (1969) and *Thomas v. State*, 206 Tenn. 633, 337 S.W.2d 1 (1960). See also T.C.A. §27-111 and T.C.A. §27-312.

Since by operation of law the trial court lost jurisdiction over this case thirty days after Morelock's Motion for New Trial was overruled, it is clear that Morelock's declaration of indigency and request for a free transcript came too late. The trial court had no power to consider any motion on July 1, 1965 because it had lost jurisdiction

over the case twenty-five days earlier.[5] Knowledge of this rule of practice can be reasonably imputed to Morelock and his retained attorney.

Thus, this case presents a situation wherein a defendant and his retained attorney delayed informing the trial court of certain information until the trial court had no power to act. The consequences of this purposeful, calculated delay must be imputed to the defendant himself and should not be considered action of the State. *Davis v. Bomar*, 344 F.2d 84 (6th Cir. 1965); *State ex rel. Johnson v. Heer*, 219 Tenn. 604, 412 S.W.2d 218 (1966); and *State ex rel. Dych v. Bomar*, 213 Tenn. 699, 378 S.W. 2d 772 (1964). By delaying too long and by doing too little to help himself, Morelock deprived the Tennessee Supreme Court of an opportunity to give him a full-scope appeal from his 1965 burglary conviction.[6] This being the case, the respondent should not be allowed to collaterally attack the validity of his 1965 burglary conviction in this proceeding.

CONCLUSION

Both the United States District Court and the Court of Appeals have failed to consider recognized state practice and at the same time have expanded the *Burgett v. Texas* rule far beyond its intended scope. The effect of the decisions will be to prevent the State from enhancing a de-

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[5]The trial court had no power to comply with that portion of T.C.A. §40-2037 which required the trial court to direct the court reporter to prepare a transcript. Nor could it have ordered a hearing on the question of respondent's indigency.

[6]This Court has also recognized that a state prisoner cannot "deliberately elect" not to comply with state procedure, and then claim later that he did not waive his right to raise the question later presented in a federal habeas corpus proceeding. **Murch v. Mottram**, 409 U.S. 41 (1972).

fendant's punishment by using any prior conviction which was affirmed on appeal without a verbatim transcript. The rationale of the decisions is equally applicable to those cases in which a defendant did not receive the benefit of any other statute because of his own inaction. The lower court's rulings are improper because they fail to take into account that the respondent had no absolute right to a transcript in 1965, that the respondent failed to show that the substitute for a full transcript available to him was constitutionally inadequate, or that the respondent had waived his opportunity to claim the benefit of a state statute. The rulings are further improper because of their failure to note that the State had no reason to doubt the validity of the respondent's 1965 burglary conviction when it was used to enhance his punishment in 1968. Absent a finding of such knowledge on the part of the State, the *Burgett v. Texas* rule is not properly applicable to this case.

The question presented is of sufficient importance for the Court to review the decisions of the United States District Court for the Eastern District of Tennessee and the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ROBERT E. KENDRICK
Deputy Attorney General

WILLIAM C. KOCH, JR.
Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219

Attorneys for Respondent

Appendix

APPENDIX A

[fol. 1]

This opinion will be released and filed on July 27, 1971, at 2:30 o'clock P. M.,
JOHN A. PARKER, Clerk

July 27, 1971
JOHN A. PARKER,
Clerk
By_____

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

APPEAL IN ERROR FROM THE CRIMINAL COURT OF SULLIVAN COUNTY. HONORABLE J. FRED BIBB, JUDGE PRESIDING BY DESIGNATION

ROY LEE MORELOCK,
Plaintiff-in-Error

No. 96

v.

Post Conviction

STATE OF TENNESSEE,
Defendant-in-Error

FOR PLAINTIFF-IN-ERROR:

William S. Todd,
Attorney-at-Law
152 Broad Street
Kingsport, Tennessee

C. Wythe Edwards
Attorney-at-Law
Blountville, Tennessee

FOR DEFENDANT-IN-ERROR:

David M. Pack
Attorney General
Nashville, Tennessee

Lance D. Evans
Assistant Attorney General
Nashville, Tennessee

Carl K. Kirkpatrick
District Attorney General
Kingsport, Tennessee

JUDGMENT AFFIRMED
JOHN A. MITCHELL, JUDGE
OPINION FILED:_____

[fol. 2] **OPINION**

Roy Lee Morelock, who will be referred to as the petitioner or by name, has appealed the dismissal, without an evidentiary hearing, of his post conviction petition, from the Criminal Court of Sullivan County, Tennessee, Honorable J. Fred Bibb, Judge Presiding by designation.

The petitioner Roy Lee Morelock was found guilty in the Criminal Court of Sullivan County September 26, 1968, of being an habitual criminal and sentenced to life imprisonment. This conviction was by his court appointed counsel, appealed to the Court of Criminal Appeals where it was reviewed and affirmed in an opinion written by Judge K. Dwyer concurred in by Judges W. Wayne Oliver and William S. Russell, filed February ___, 1970.

On this appeal, the defendant did not seek a reversal of the conviction but insisted upon a modification of the judgment by vacating the verdict of the jury finding Morelock to be an habitual criminal, and insisting the court enter judgment only on the conviction of burglary in
[fol. 3] the third degree and a sentence of seven years.

Opinion

The opinion of this Court on the appeal from the habitual criminal conviction recited that:

"The seventh assignment of error complains of the convictions being had on the same date and day, therefore being one conviction. We have examined the record in this and find that the court charged the jury that three of the convictions complained of (that is, the burglary in the third degree in which the two felonious assaults occurred) should only be considered by the jury as one offense. The attorney general agreed to this action taken by the court. We find from our review of the charge as given to be a full and fair review of the law applicable to the issues. We further find that there were three prior felony convictions plus the one returned on the first count of the indictment."

On this appeal the defendant complained of the procedure in the court's failure to pronounce sentence upon the conviction of burglary but submitted the matter to the jury on the question whether the defendant was an habitual criminal and upon their finding that he was an habitual criminal allowed the jury to fix the increased punishment at life imprisonment. All of the assignments of error
[fol. 4] were found without merit and the conviction was affirmed.

The petitioner Roy Lee Morelock on August 25, 1970 from his place of confinement in the State Penitentiary filed his petition for post conviction relief in which he alleged his conviction as an habitual criminal was illegal and raised substantially the same questions that were raised and adjudicated on his original appeal of the habitual criminal conviction.

On the same date the petitioner Morelock filed an amended petition in which he alleged his conviction of burglary in the third degree, in the Criminal Court of Sullivan County in March 1965 was improperly used as a prior felony conviction in the habitual criminal conviction, and that the third degree burglary conviction was invalid because he had been denied an appeal from that conviction.

The District Attorney General on August 28, 1970 filed an answer to the petition in which he denied the allegations in the petition, and averred that Judge H. C. Smith of the Criminal Court of Sullivan County granted the petitioner's appeal. That at the time of the 1965 burglary conviction in the Criminal Court of Sullivan County, Tennessee the petitioner was represented by retained counsel of his own choosing, Honorable C. Wythe Edwards of Blountville, Tennessee. That the conviction was affirmed by the Supreme Court.

[fol. 5]

The records show that after the petitioner had been convicted of burglary in Sullivan County in March, 1965 his privately retained counsel Honorable C. Wythe Edwards of Blountville, Tennessee filed a motion for a new trial which was overruled by the trial judge Honorable H. C. Smith and 60 days allowed for filing a bill of exceptions which expired July 6, 1965, without a bill of exceptions being filed.

Petitioner's privately employed counsel says in his affidavit of April 2, 1971 that he represented Roy Lee Morelock on this charge of burglary in the Criminal Court of Sullivan County in March 1965. That Morelock was not able to pay his fee and was not able to raise money to pay the court reporter who transcribed the trial proceedings, and that between July 1, 1965 and July 6, 1965 he made a motion before the trial judge to appoint counsel for More-

lock on his appeal because he was indigent. This was at least 55 days after the motion for a new trial

[fol. 6] was overruled. He also made application to the trial judge at that time for an order requiring a bill of exceptions be furnished the petitioner at State expense under the provisions of Ch. 221 of the Public Acts of 1965 (T. C. A. 40-2037) which had become effective July 1, 1965, the court denied both of these motions, and that Morelock was denied an effective appeal.

This affidavit of Morelock's employed counsel was made on April 2, 1971 long after the action of the trial judge in dismissing the petition on October 15, 1970, without an evidentiary hearing, and the Attorney General insists this is an attempt to amend the petition on Appeal.

This was not timely notice to the trial judge of the petitioner's contention that he was indigent. *State ex rel. Dych v. Bomar*, 213 Tenn. 699, 378 S.W.2d 772.

The Supreme Court of Tennessee considered the appeal in the 1965 burglary conviction, on the technical record, without a bill of exceptions and on February 7, 1966 affirmed the judgment of the trial court.

[fol. 7] The petitioner did not make application to the trial court for an adjudication of indigency and request for a bill of exceptions at state expense, within thirty days after the overruling of the motion for a new trial. In fact Chapter 221 Public Acts of 1965 which provides for a bill of exceptions at State expense, on proper application did not become effective until five days prior to the expiration of the time allowed for filing a bill of exceptions, and was not effective in time to apply to the petitioner's 1965 appeal because the trial judge could not declare the petitioner indigent and order a bill of ex-

ceptions at State expense after more than thirty days after the motion for a new trial was overruled. No State action is involved here. *State ex rel. Dych v. Bomar, supra.*

We further find that the petitioner having failed to attack the validity of his March 1965 conviction for burglary on his appeal of the habitual criminal conviction, he will be deemed to have waived that question. T. C. A. 40-3812.

We hold that the petition is without merit and it was not error for the trial judge to dismiss the petition without an evidentiary hearing.

[fol. 8] The judgment is affirmed.

/s/ John A. Mitchell
JOHN A. MITCHELL, JUDGE

CONCUR:

/s/ W. Wayne Oliver
W. WAYNE OLIVER, JUDGE

/s/ Charles Galbreath
CHARLES GALBREATH, JUDGE
with separate opinion

THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

[fol. 9] **APRIL 1971**

ROY LEE MORELOCK
Plaintiff in Error

Vs.

STATE OF TENNESSEE
Defendant in Error

N. 96

SULLIVAN COUNTY

CONCURRING OPINION

I concur in Judge Mitchell's opinion affirming the judgment below.

Even if all that is stated in the record and the affidavit of privately retained counsel who represented the petitioner in his 1965 trial is true, there appears no explanation of why a bill of exceptions was not filed if both the
[fol. 10] defendant and his lawyer desired appellate review. Even at this late date, according to the affidavit setting out that the defendant was indigent and could not afford to pay a court reporter to transcribe the trial record, it is not contended that a narrative bill could not have been made available to the trial judge for settlement. On the contrary, it appears from a recitation in the affidavit of the proof relating to the point that would have been raised on appeal, i.e., the ownership of the building laid in the indictment, that even now, some 16 years later, these facts are retained in the memory of trial counsel.

A narrative bill of exceptions, when it clearly contains all the points in issue on appeal, is, to at least one member of this Court, preferable to a verbatim transcript; and unless some reason can be shown why retained counsel was unable to get up such a bill of exceptions, there has been no deprivation of the right to an effective appeal demonstrated.

/s/ Charles Galbreath
CHARLES GALBREATH, JUDGE

APPENDIX B

[fol. 1]

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

ROY LEE MORELOCK,
Petitioner

v.

ROBERT MOORE, Warden, etc.,
Respondent

Civil action
no. 2782

MEMORANDUM OPINION AND ORDER

(Filed February 22, 1972)

This *pro se* application for the federal writ of habeas corpus was dismissed. See judgment on decision by the

Court of October 8, 1971 herein. The predicate for such decision was that the applicant had failed to exhaust his state remedies. See memorandum and order of October 8, 1971 herein. The applicant now moves the Court to revive this proceeding, claiming that he has exhausted all state remedies available to him.* 28 U. S. C.

[fol. 2] §§ 2254 (b), (c).

The question presented herein by the applicant is whether his prior final conviction of a felony in the Criminal Court of Sullivan County, Tennessee in March, 1965 could be utilized to enhance his punishment to life imprisonment on September 26, 1968 under T. C. A. §§ 40-2801, et seq., when he was denied an appeal from such conviction. The factual background relating to this issue is stated for the Court of Criminal Appeals of Tennessee, as follows:

* * *

> The records show that after the petitioner had been convicted of burglary in Sullivan County in March, 1965 his privately retained counsel Honorable C. Wythe Edwards of Blountville, Tennessee filed a motion for a new trial which was overruled by the trial judge Honorable H. C. Smith and 60 days [were] allowed
>
> [fol. 3] for filing a bill of exceptions which expired July 6, 1965, without a bill of exceptions being filed.
>
> Petitioner's privately employed counsel says in his affidavit of April 2, 1971 that he represented Roy Lee Morelock on this charge of burglary in the Criminal Court of Sullivan County in March, 1965; [t]hat More-

*Exhibited with such motion is a copy of the denial by the Tennessee Supreme Court of the applicant's petition for certiorari to the Court of Criminal Appeals of Tennessee, relating to the decree of the Criminal Court of Sullivan County, Tennessee in **Roy Lee Morelock v. State of Tennessee.**

lock was not able to pay his fee and was not able to raise money to pay the court reporter who transcribed the trial proceedings, and that between July 1, 1965 and July 6, 1965 he made a motion before the trial judge to appoint counsel for Morelock on his appeal because he was indigent. This was at least 55 days after the motion for a new trial was overruled. He also made application to the trial judge at that time for an order requiring a bill of exceptions [to] be furnished the petitioner at State expense under the provisions of the Public Acts of 1965 (T. C. A. 40-2307) which had become effective July 1, 1965, [that] the court denied both of these motions, and that Morelock was denied an effective appeal.

* * *

Roy Lee Morelock, plaintiff in error, v. *State of Tennessee*, defendant in error, no. 96, post-conviction, in the Court of Criminal Appeals of Tennessee, opinion of July 27, 1971, pages 3-4.

The majority of that Court pointed out that Tennessee began providing indigents with bills of exceptions at state expense in insufficient time for the trial judge to have declared Mr. Morelock an indigent and to have ordered such bill of exceptions at state expense; that Mr. Morelock had waived the question involved by failing to attack the validity of the questioned conviction on the appeal of his judgment of conviction as an habitual criminal, T. C. A. § 40-3812; and that no state action was involved in the applicant's failure to appeal. Another judge of that Court concluded that, as the only point which could have been raised on such appeal was the ownership alleged in the indictment of the building burglarized, a narrative bill of exceptions could have

[fol. 4]

been settled by counsel and the trial judge; consequently that no deprivation was shown of the petitioner's right to appeal his judgment of conviction as an habitual criminal.

This Court is of the opinion that the question presented cannot be reached in this proceeding. " * * * Where * * * the time for filing an appeal has expired, the [fol. 5] conviction is final within the meaning of habitual criminal statutes. * * * " 39 Am. Jur. (2d) 315, Habitual Criminals, Etc., § 8. A judgment of conviction, having become final, constitutes a conviction under a habitual criminal statute and cannot be reached in a habeas corpus proceeding. *Dye v. Skeen* (1950), 135 W. Va. 90, 63 S. E. (2d) 681, 24 A. L. R. (2d) 1234 (headnote 7). *Cf.* also *People ex rel. McAllister v. Kaiser* ( ), 203 N. Y. S. 511, 122 Misc. 245.

For such reason, the applicant is entitled to no relief on the merits, and his motion to revive this proceeding hereby is DENIED. Rule 58, Federal Rules of Civil Proceeding. A timely notice of an appeal, see memorandum and order of October 8, 1971 herein, will be treated as stated therein, but, in the light of the legal question presented here, will ISSUE. Rule 22(b), Federal Rules of Appellate Procedure.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[fol. 1]

FILED
Feb. 9, 1973
James A. Higgins, Clerk

ROY LEE MORELOCK
Petitioner-Appellant

v.

ROBERT MOORE, WARDEN
Respondent-Appellee

ORDER

NO. 72-1250

Before: McCREE and LIVELY, Circuit Judges and KENNEDY, District Judge*

Appellant was convicted in 1968 in a State Court of Tennessee on charges of burglary and of being a habitual criminal. In his habeas corpus petition he alleged that one of the prior convictions necessary for a finding that he was a habitual criminal in 1968 was void because he was denied certain constitutional rights in connection with his conviction for a 1965 burglary. The petition was denied without an evidentiary hearing.

The records pertaining to the 1965 conviction were not transmitted to this Court on appeal and we are unable to determine whether the 1965 conviction was so tainted that it was not a proper basis for a finding of habitual criminality in the 1968 prosecution.

---

*Honorable Cornelia G. Kennedy, United States District Judge from the Eastern District of Michigan, sitting by designation.

[fol. 2] The judgment of the District Court denying relief is vacated and this case is remanded with directions that the District Court conduct a hearing and make findings on the following subjects:

(a) The grounds asserted in petitioner's motion for a new trial following his 1965 conviction,

(b) whether petitioner was in fact indigent at the time of the 1965 conviction,

(c) whether the petitioner did in fact have effective assistance of counsel with respect to his attempted appeal from the 1965 conviction, and

(d) whether petitioner was entitled to a free bill of exceptions on appeal from the 1965 conviction.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins

Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

[fol. 1]

ROY LEE MORELOCK,
Petitioner,

v.

JIM ROSE, ETC.,
Respondent.

Civil action
no. 2782

MEMORANDUM OPINION AND ORDER

(Filed May 11, 1973)

In obedience to the directions of the United States Court of Appeals, see order of Feb. 9, 1973 in *Roy Lee Morelock*, petitioner-appellant, v. *Robert Moore, Warden*, respondent-appellee, no. 72-1250, this Court conducted a hearing on April 25, 1973 and a further hearing on May 8, 1973 herein and makes the following findings:

1) The grounds asserted in the petitioner's motion for a new trial, as amended, in *State of Tennessee v. Roy Lee Morelock*, in the Criminal Court for Sullivan County, Tennessee, following a trial thereon on March
[fol. 2] 25-26, 1965, are as set forth in the appendix hereto, *infra*.

2) The petitioner Mr. Morelock was in fact indigent on March 25, 1965; however, this fact was at no time, prior

to or during trial, communicated to the presiding judge at such trial, and the petitioner's retained counsel C. Wythe Edwards, Esq. extended the petitioner credit for his fee in such representation.

3) The petitioner had effective assistance of counsel with respect to his attempted appeal from his conviction in the aforementioned trial. After the effective date of an amendment to T.C.A. § 40-2037* on July 1, 1965, and before the expiration on July 6, 1965 of the time allowed for filing a bill of exceptions, such counsel moved the trial judge to appoint counsel to represent the petitioner on appeal, and that he be furnished at state expense a transcript [fol. 3] from the official record of the trial for inclusion in a bill of exceptions. *Idem*. Although the petitioner and his trial counsel both stated under oath that a court reporter had recorded verbatim all proceedings of the trial held in open court, the trial judge denied the foregoing motion of the petitioner. There appears nothing more trial counsel could have done at the trial level to effectively assist the petitioner with his appeal.

4) The petitioner, upon the direction of the trial court, was entitled on and after July 1, 1965 to have a reporter designated by the court transcribe from the original records the matter necessary for a bill of exceptions and to certify and deliver the transcript as requested. T.C.A. § 40-2037, as amended and effective July 1, 1965.

---

* "• • • Upon the direction of the court in the case of an indigent defendant, • • • a reporter designated by the court shall transcribe from the original records such parts of the proceedings as are requested, attach his official certificate and deliver the transcript as requested. • • • [N]othing contained herein is intended to alter or amend the procedure for perfecting appeals as provided in chapter 1 of title 27 of this Code. • • •" T.C.A. § 40-2037, as amended.

The petitioner was denied a transcript of the record of his trial which was needed to effectively prosecute an appeal from his 1965 conviction. An indigent criminal defendant is entitled to a transcript of the record of his trial, or an adequate substitute therefor, where needed to effectively prosecute an appeal from his conviction. *Griffin v. Illinois* (1956), 351 U.S. 12, 76 S. Ct. 1366,
[fol. 4] 10 L. Ed. (2d) 456. Had the petitioner possessed the funds to pay privately for a transcript, he could have perfected his appeal from his conviction. The state must, as a matter of equal protection, provide indigent prisoners with the basic tools for an adequate appeal when those tools are available for a price to other prisoners; the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective appeal. *Britt v. North Carolina* (1971), 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. (2d) 400, 403 [2]. The reason the state of Tennessee denied Mr. Morelock a transcript of the evidence on his 1965 conviction for use on appeal is not made to appear. So far as this record shows, no reason therefor was given. The petitioner appears not to have had any alternative to a transcript for his bill of exceptions. *Cf. ibid.*, 404 U.S. at 230, 30 L. Ed. (2d) at 405 [6].

The petitioner claimed, *inter alia*, in his motion for a new trial that the evidence had not reflected the ownership of the business house he was convicted of having burglarized; yet, the Tennessee Supreme Court presumed from the absence of a bill of exceptions "* * * that the evidence
in the cause was sufficient to support the verdict
[fol. 5] of the jury and judgment thereon. * * *" *Roy Lee Morelock*, plaintiff in error, v. *State of Tennessee*, defendant in error, opinion of Tennessee Supreme Court of February 7, 1966, p. 2. A prior con-

viction cannot be considered under a habitual criminal statute if it was obtained in violation of the fundamental constitutional rights of an accused. *Burgett v. Texas* (1967), 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. (2d) 319. It results that the Criminal Court of Sullivan County, Tennessee was not permitted to use Mr. Morelock's 1965 conviction in enhancing to life imprisonment his punishment under the Tennessee habitual criminal statute following his conviction of another crime of burglary on September 26, 1968.

It appearing that in the 1968 trial, the jury returned a verdict of guilty of burglary in the third degree and fixed therein the petitioner's punishment therefor at confinement for not more than seven years, but that sentence thereupon was not pronounced, the United States marshal for this district will deliver the body of the petitioner Mr. Roy Lee Morelock to the sheriff of Sullivan County, Tennessee, for his appearance before the judge of the Criminal [fol. 6] Court of Sullivan County, Tennessee for sentencing under such verdict, at some time announced to be convenient with the Court, but not more than 30 days herefrom.

The respondent will report compliance with this directive forthwith upon its happening, pending which such report all other matters hereby are RESERVED.

ENTER:

/s/ C. G. Neese
(C. G. Neese)
United States District Judge

[fol. 1] APPENDIX

STATE OF TENNESSEE vs. ROY LEE MORELOCK	IN THE CRIMINAL COURT FOR SULLIVAN COUNTY, TENNESSEE

MOTION FOR NEW TRIAL

Comes the defendant, Roy Lee Morelock, and moves the Court to set aside the verdict of the jury and grant him a new trial on the following grounds:

I

There is no evidence to support the verdict.

II

Specifically, there was no proof submitted to the jury that would indicate that the defendant feloniously broke and entered as alleged with the intent to commit a felony therein, to wit: larceny of $50.00 cash, the jury having, by its verdict, exonerated the defendant of the offense of larceny.

III

There was no proof that any other felony was committed and, therefore, since the jury found the defendant innocent of the felony charged, a very material part of

[fol. 2] the State's proof is lacking.

Motion for New Trial

IV

There was no proof of any felonious intent on the part of the defendant.

V

There was no proof that Sullivan County owned the "business house" as alleged and, further, there was no proof at all as to the ownership of Sullivan High School.

VI

The evidence preponderates in favor of innocence and against the guilt of defendant.

VII

The verdict is contrary to the law and the evidence in the case.

VIII

The Court erred in denying defendant's motion to quash the presentment, it appearing that no competent material proof could have been presented to the Grand Jury by the three witnesses, Fletcher, Scruggs and Bailey; it further appearing that these were the only witnesses who appeared before the Grand Jury.

[fol. 3] IX

The Court erred in admitting Exhibit #4 (the Scotch tape star), it not appearing that the witness was properly qualified in such matters.

Motion for New Trial

X

The Court erred in admitting Exhibit #7 (the boots taken from Morelock) to the jury, it appearing that defendant was not warned of his Constitutional privileges — that the taking of this article from the defendant was a violation of his right against self-incrimination.

XI

The Court erred in allowing Exhibit #7 to be presented to the jury, it appearing that this article was taken while the defendant was being illegally detained as there was no probable cause for his arrest.

XII

The Court erred in allowing the testimony of the witness, J. C. Fletcher, concerning his questioning of the defendant when it appeared that the defendant was not warned of his Constitutional right against self-incrimination.

XIII

The Court erred in allowing the testimony of witnesses Hughes, Thompson and Heiberger (F.B.I. agents), it appearing that the material about which they testi-
[fol. 4] fied was not properly identified or transmitted and that said material was obtained illegally.

XIV

The Court erred in permitting the witness, F.B.I. Agent Thompson to testify in the manner in which he did — standing down in front of the jury explaining reasons, motives and theories.

Motion for New Trial

XV

The Court erred in allowing Exhibit #____ (trousers of defendant) to be presented to the jury as no search warrant was issued and said exhibit was obtained by illegal means.

XVI

The Court erred in admitting the scrappings allegedly taken from defendant's boots and trousers as these items were obtained by illegal means.

XVII

The Court erred in not issuing the proper orders to command the production of the warrant allegedly issued for the defendant's arrest, it appearing that the prosecutor, J. C. Fletcher, had "checked out" the warrant from the Clerk's Office and turned it over to the Attorney General or his assistant, and it further appearing that said warrant was the basis for the defendant's incarceration in the County Jail from February 8, 1965 until the time of the presentment on March 2, 1965.

[fol. 5]

XVIII

It was error to allow the Attorney General to cross-examine his own witness, Pearl Collins, it appearing that the basis for such cross-examination was her reluctance to testify because she had been threatened by the State prosecutor, J. C. Fletcher.

XIX

The Court erred in allowing the state to cross-examine their own witness, Ellen Dykes, since the basis for such cross-examination was an alleged discrepancy in her writ-

ten statement and her testimony, it appearing that the State knew about such discrepancy before placing her on the stand, and it further appearing that she admitted making the written statement.

XX

There were repeated uncalled for and objectionable references by the State's attorneys to "Long Island" and "Black Bottom" for the purpose of associating defendant with places what bear a poor reputation.

XXI

There were repeated uncalled for and objectionable references by the Attorney General and his witnesses to one Toby Steadman in an attempt to associate
[fol. 6] defendant with him since these same jurors had either sat in the Courtroom or were on the jury which had convicted the said Toby Steadman of a crime a few days earlier in the same term.

XXII

There were uncalled for references by the State's witnesses to the fact that the defendant was on probation.

WHEREFORE, the defendant moves the Court to set aside the verdict of the jury and grant him a new trial.

CARR & EDWARDS
Attorneys for Roy Lee Morelock

[fol. 1] APPENDIX

STATE OF TENNESSEE	IN THE CRIMINAL COURT
vs.	FOR SULLIVAN COUNTY
ROY LEE MORELOCK	AT BLOUNTVILLE, TENNESSEE

AMENDMENT TO MOTION FOR NEW TRIAL

Comes the defendant, Roy Lee Morelock, and moves the Court to allow him to amend his motion for a new trial so as to include the following grounds:

That since the trial and since filing his motion for a new trial, he has discovered new and valuable evidence which he believes would have changed the result and which he believes will be sufficient to bring about a verdict in his favor on a new trial. The newly discovered evidence is the ARREST REPORT of the Sullivan County Sheriff's Department, which is attached to the warrant for the defendant's arrest.

CARR & EDWARDS

_____

Counsel for the Defendant

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[fol. 1]

FILED
Dec. 14, 1973
James A. Higgins, Clerk

ROY LEE MORELOCK
Petitioner-Appellee

v.

ROBERT MOORE, Warden
Tennessee State Penitentiary

ORDER

NO. 73-1834

BEFORE: McCREE, MILLER, and LIVELY, Circuit Judges.

This is the second appeal in connection with Morelock's habeas corpus petition. On the first appeal we vacated the judgment of the district court in which the petition was denied and this court directed the district court to conduct a hearing and make findings on four specific subjects. In compliance with the order of this court an evidentiary hearing was conducted in the district court and as a result thereof an order was entered granting the petition for habeas corpus and specifying the relief to which petitioner was entitled.

After consideration of the entire record, including the briefs and oral arguments, we conclude that the district court has properly complied with the directions of this court and that its findings and conclusions as set forth in its memorandum opinion and order filed May 11, 1973 are correct.

[fol. 2] For the reasons set forth in the memorandum opinion and order of the district court, it is ORDERED that the judgment be, and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins

Clerk